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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

HANSEN BEVERAGE COMPANY, a
Delaware corporation

Petitioner,

vs.

DSD DISTRIBUTORS, INC., a
Wisconsin corporation

Respondent.

Case No: 08 CV 0619 LAB RBB

**DSD DISTRIBUTORS, INC.'S
RESPONSE TO HANSEN
BEVERAGE COMPANY'S EX
PARTE APPLICATION FOR
LEAVE TO FILE SURREPLY**

Judge: Hon. Larry A. Burns

Hearing
Date: June 9, 2008
(Matter taken under submission without
oral argument)

Petitioner Hansen Beverage Company ("Hansen") has requested leave to file the surreply that Petitioner has effectively already filed with the Court, and without even attempting to set forth why DSD has "good cause" for this *ex parte* application or surreply. Respondent DSD Distributors, Inc. ("DSD") asks that the

1 Court deny Petitioner's motion and strike Petitioner's surreply for failure to show
2 good cause.

3 In the alternative and in response, DSD asks the Court to note that, with
4 regard to Hansen's first point, if Hansen believes that the additional local
5 defendants in the Wisconsin action were only added to defeat diversity, as Hansen
6 appears to suggest in its surreply, Hansen certainly could have still sought to
7 remove that action and argue those parties were "sham" defendants. Hansen did
8 not do so.

9 With regard to Hansen's second point, Hansen's claim that it "did not agree .
10 . . that Wisconsin law governed the arbitration and all claims raised and resolve[d]
11 in the arbitration" is simply incorrect. The parties' contract incorporates the JAMS
12 Comprehensive Arbitration Rules and Procedures, of which Rule 25 states that
13 enforcement of awards shall be governed by the FAA "or applicable state law."
14 Hansen thus agreed to application of Wisconsin law in the original contract by
15 contracting with a Wisconsin dealer protected by Wisconsin law. The Arbitrator's
16 Choice of Law ruling then confirmed this, and specifically stated that "Hansen
17 *agree[d]*" that Wisconsin law would apply if DSD is found to be a dealer. (DSD
18 Reply, p. 7, Ins. 3-11.) Hansen then proceeded to arbitrate the dispute in spite of
19 this ruling, and DSD was found to be a dealer.

20 Likewise, Hansen's claim that the Arbitrator's Final Award somehow
21 contradicts his earlier ruling to hold that only California law applies to
22 confirmation of the award (see Ex Parte App., p. , Ins. 4-9) is also simply false, and
23 misleads this Court. To the contrary, the Final Award, as quoted by Hansen itself,
24 notes that "the Federal Arbitration Act and the JAMS Comprehensive Rules"
25 apply, and, as noted above, the JAMS Comprehensive Rules call for application of
26 the FAA or "applicable state law."

27 In this case, Hansen cannot deny that application of the Wisconsin Fair
28 Dealership Law was the central issue in the arbitration, and thus application of

1 Wisconsin law is central to any evaluation of whether the Arbitrator properly
 2 carried out his duties. Indeed, the Wisconsin Fair Dealership Law itself expressly
 3 prohibits parties from circumventing its protections by way of contract.¹ Hansen
 4 also cannot deny that a Wisconsin state court is best positioned to make this
 5 determination, and can do so whether through application of Wisconsin's law
 6 related to enforcement of arbitrations, or the FAA itself. *See Southland Corp. v.*
 7 *Keating*, 465 U.S. 1, 15-16, 104 S.Ct. 852, 860-861 (1984) (state court may apply
 8 FAA).

9 Accordingly, there is no reason why a California state or federal court must
 10 hear Hansen's petition – and because this federal Court lacks subject matter
 11 jurisdiction and because of the pending parallel action in Wisconsin, DSD
 12 respectfully submits this Court may not hear this petition.

13 Respectfully submitted,
 14 Dated: June 10, 2008 FOLEY & LARDNER LLP
 15 LEILA NOURANI
 16 MICHAEL B. MCCOLLUM

17 By: /s/ Leila Nourani
 18 Attorneys for Respondent
 19 DSD DISTRIBUTORS, INC.,
 20 a Wisconsin corporation
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27 ¹ Wis. Stat. § 135.025(3) (“The effect of this chapter may not be varied by contract
 28 or agreement. Any contract or agreement purporting to do so is void and
 unenforceable to that extent only.”)